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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 295

H. P. WELCH COMPANY,

Appellant,

vs.

STATE OF NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

STATEMENT AS TO JURISDICTION.

RICHARD F. UPTON,
LAWRENCE I. DUNCAN,
ROBERT W. UPTON,
Counsel for Appellant.

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SUPREME COURT, STATE OF NEW HAMPSHIRE

1938 TERM.

H. P. WELCH COMPANY,

Appellant,

vs.

STATE OF NEW HAMPSHIRE,

Appellee.

STATEMENT IN SUPPORT OF JURISDICTION.

The appellant, H. P. Welch Company, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344(a) of Title 28 of the United States Code, reading, to the extent relevant here, as follows:

> "Sec. 344(a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

B.

Statutes of the State the Validity of Which is Involved.

The statutes of the State of New Hampshire, the validity of which has been sustained by a final decree of the Supreme Court of the State of New Hampshire, the highest court of said State, as not being violative of or repugnant to the Constitution and laws of the United States, are Sections 3, 4, 8 and 11 of Chapter 106, as amended by Chapter 169, Session Laws of 1933, State of New Hampshire, approved May 6, 1933 (Session Laws of 1933, page 146). The pertinent provisions thereof are:

"CHAPTER 106.

"An Act Relating to Carriers of Property for Hire on the Public Highways.

* * * * * * *

"2. Common Carrier Registration.—No person, corporation, partnership, association, railroad or railway company, shall operate any motor vehicle, not running upon rails or tracks, upon any public highway transporting property for hire as a common carrier, between points within this state, without first obtaining a registration and special number plates from the public service commission, hereinafter called the commission. * * *

"3. Contract Carrier Registration.—The term contract carrier as used in this act shall include every person, firm or corporation transporting property for hire by motor vehicle on any public way in this state, other than common carriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. * * * No contract carrier shall

operate any motor vehicle for the transportation of property for hire on any public way between points within this state without first obtaining a registration certificate and special number plates from the commission.

"4. Exemptions.—There shall be exempted from the provisions of this act:

I. Motor vehicles not principally engaged in the transportation of property for hire.

II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. * * *

"8. Hours of Service.—It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. * * * The commission shall have authority to enforce the provisions of this section.

"11. Revocation.—The commission shall have authority after notice and hearing, to suspend or revoke any registration certificate issued in accordance with the provisions of this act for violation of the provisions of this act."

The foregoing sections are believed to conflict with section one of the Fourteenth Amendment to the Constitution of the United States and, as applied to the appellant's business in interstate commerce, with Section 304(a) of Title

49 of the United States Code, commonly cited as "The Motor Carrier Act of 1935", the provisions of which are as follows:

> "SEC. 304(a). Powers and Duties Generally. It shall be the duty of the Commission—
>
> "(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.
>
> "(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final decree of the Supreme Court of the State of New Hampshire, which is now sought to be reviewed was June 7, 1938. Appellant's motion for a rehearing was denied on June 21, 1938. The time for taking the appeal began to run on the date of the denial of said motion for a rehearing, to wit, June 21, 1938. *Aspen Mining & Smelting Co.* v. *Billings,* 150 U. S. 31.

The date on which the application for appeal was presented and the appeal allowed was July 14, 1938.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellant may bring its appeal

within three months after the entry of the decree of the Supreme Court of the State of New Hampshire.

D.

Nature of Case and Rulings Below.

On April 13, 1937, the appellant, H. P. Welch Company, a Massachusetts corporation operating on the highways of New Hampshire in the common carriage of property by motor vehicle, was ordered to appear before the Public Service Commission of New Hampshire to show cause, if any, why its common and contract carrier registrations should not be suspended. The appellant was charged with violating section 8 of Chapter 106, as amended by Chapter 169 of the New Hampshire Session Laws of 1933, relating to hours of service of truck drivers (R. 6). A hearing was held before the Commission on May 10, 1937, at which the case against the appellant was prosecuted by counsel for the State of New Hampshire, appellee, and defended by counsel for the appellant. In the course of the hearing it appeared in evidence, which was uncontroverted, that every truck operated by the appellant corporation always carried some interstate shipments and that 99 per cent of the tonnage carried by the appellant consisted of interstate shipments (R. 52, 55). On December 11, 1937, the Commission issued a report finding the appellant corporation guilty of violating the said section 8, in its operations in interstate commerce, during the years 1936 and 1937 (19 N. H. Public Service Commission Reports, 445, 446; R. 8, 9). The Commission held that Section 8 applied to the appellant's operations in interstate commerce and that said section together with sections 3 and 4 did not unreasonably classify the appellant and discriminate against it (19 N. H. Public Service Commission Reports 447, 456; R. 10, 18). Accordingly the Commission issued an order by virtue of its power under

Section 11 of said Chapter 106, suspending for five consecutive days the appellant's common and contract carrier registration to operate in intrastate transportation in New Hampshire. (19 N. H. Public Service Commission Reports 464; R. 26). The appellant seasonably moved for a rehearing assigning as reasons that the said Section 8 of Chapter 106, as applied to interstate commerce, had been superseded in the year 1935 by Section 304(a) of Title 49 of the United States Code and that the said Section 8 together with Sections 3 and 4 constituted an unreasonable and discriminatory classification, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 28). On December 22, 1937, the Commission denied appellant's motion for a rehearing (R. 27).

Thereupon the appellant appealed from the Commission's order to the Supreme Court of the State of New Hampshire, in accordance with the provisions of Chapter 239 of the Public Laws of New Hampshire. The order of the Commission was suspended pending the appeal. In its petition for appeal the appellant seasonably claimed that the said Section 8 of Chapter 106 of the Session Laws of 1933, as applied to interstate commerce, had been superseded by Section 304(a) of Title 49 of the United States Code, and that the said Section 8 together with Sections 3 and 4 denied the appellant the equal protection of the laws, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 5).

On June 7, 1938, the Supreme Court of the State of New Hampshire rendered a decree dismissing the appellant's appeal and affirming the order of the Commission. *H. P. Welch Co.* v. *State*, 89 N. H. —.

The Supreme Court held that the exemption of certain carriers, under Sections 3 and 4 of said Chapter 106, from the operation of said chapter did not constitute an unrea-

sonable classification so as to deny to the appellant the equal protection of the laws. The Court stated in its opinion:

> "We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a 'rational basis', or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional." (89 N. H.)

The Court further held that the enactment of Section 304(a) of Title 49 of the United States Code, commonly cited as the "Motor Carrier Act of 1935", had not rendered inoperative the said Section 8 of Chapter 106 of the New Hampshire Session Laws of 1933 as applied to interstate commerce, because the Interstate Commerce Commission had not exercised its authority under the said "Motor Carrier Act of 1935" to prescribe maximum hours of service, at the time when the alleged violations of Section 8 of the New Hampshire statute occurred. The Court stated in its opinion:

> "Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truck-drivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject." (89 N. H.).

The Interstate Commerce Commission on June 14, 1938, issued an order entitled *Ex Parte No. MC-2*, fixing August 1, 1938, as the effective date of its orders as to maximum hours of service of motor carrier employees, issued pursuant to the "Motor Carrier Act of 1935."

In hearing and deciding the aforesaid appeal by the appellant from the order of the Public Service Commission, the Supreme Court of the State of New Hampshire was acting in a judicial capacity, rather than in an administrative or legis-

lative capacity. Appeals from orders of the Public Service Commission are governed by Chapter 239 of the Public Laws of New Hampshire. In the case of *Grafton County Electric Light Co.* v. *State*, 77 N. H. 490, 508, the Supreme Court of New Hampshire held that the statutory appeal from the Public Service Commission is a "judicial" proceeding. The power of review which the said Chapter 239 of the Public Laws confers upon the Supreme Court of New Hampshire is quite similar to that which the Supreme Court of the United States has held to be of "judicial" character in the cases of *Federal Radio Commission* v. *Nelson*, 289 U. S. 266, and *Public Service Commission of Porto Rico* v. *Havemeyer*, 296 U. S. 506. Consequently the Supreme Court of the United States may review the decree of the Supreme Court of the State of New Hampshire in this case, the said decree having been rendered in a judicial proceeding.

E.

Substantiality of Questions Involved.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258.

The issue raised by the appellant's contention that the New Hampshire statute here in question violates the "equal protection clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States involves the problem of discriminatory classification. Section 8 of Chapter 106, as amended by Chapter 169 of the New Hampshire Session Laws of 1933, limits the hours of service of truck-

drivers employed by all motor carriers engaged in "the transportation of property for hire on the highways of this state". This section is designed to safeguard the general public with respect to use of the highways. Sections 3 and 4 of the said Chapter 106 exempt from the operation of Section 8 all "carriers transporting products of their own manufacture or labor", all "motor vehicles not principally engaged in the transportation of property for hire", and all "motor vehicles operating exclusively within the limits of a single city or town or within ten miles of the limits thereof." It is a matter of general knowledge that the traffic of motor carriers thus exempted by Sections 3 and 4 of the said Chapter 106 is large and presents the same hazards to the public as the traffic of those motor carriers which are subject to the said Section 8. So far as the New Hampshire statute is designed to safeguard the public with respect to the use of the highways, the appellant contends that the discrimination it makes between those motor carriers which are relieved from the operation of the said Section 8, and a motor carrier such as the appellant, is wholly arbitrary and unreasonable. "Such a classification is not based on anything having relation to the purposes for which it is made." *Smith* v. *Cahoon*, 283 U. S. 553. Furthermore the question thus raised by the New Hampshire statute here in question has never been expressly passed upon by the Supreme Court of the United States. For these reasons, the appeal presents a substantial Federal question. *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476.

The issues raised by the appellant's contention that the New Hampshire statute here in question is repugnant to the "Motor Carrier Act of 1935" have also never been decided by the Supreme Court of the United States. Section 8 of the said Chapter 106 of the New Hampshire Session Laws of 1933, as before stated, limits the hours of service of truck-drivers employed by carriers transporting property for

hire. In the case at bar the Supreme Court of the State of New Hampshire has held Section 8 applicable to the appellant's truck-drivers employed in interstate transportation during the years 1936 and 1937. The "Motor Carrier Act of 1935" delegates to the Interstate Commerce Commission the power and duty to establish reasonable regulations concerning maximum hours of service of truck-drivers engaged in interstate transportation (49 U. S. C., § 304 (a)). During the years 1936 and 1937, when it is alleged that the appellant corporation violated Section 8 of the New Hampshire Statute in question, there were in effect no regulations by the Interstate Commerce Commission concerning maximum hours of service of truck-drivers employed in interstate transportation. But the act of Congress here in question had already recognized the necessity for Federal regulations of hours of service and had prescribed the method by which such regulations should become effective. Since the enactment of the "Motor Carrier Act of 1935", no regulations of hours of service prescribed by any other authority could be effective to regulate motor carriers of interstate commerce. *Northern Pacific Railway Company* v. *Washington*, 222 U. S. 370; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605.

Furthermore, the appeal upon this latter ground presents questions, the determination of which is important to all interstate carriers by motor vehicle and to all State regulatory authorities. The "Motor Carrier Act of 1935" has placed a vast field of interstate commerce under the jurisdiction of the Interstate Commerce Commission. Much of this field has hitherto been under the jurisdiction of the respective States and their public utilities commissions. Whether this transfer of jurisdiction to the Interstate Commerce Commission operates to supersede all State regulation in the field, even before the Interstate Commerce Commission issues regulations pursuant to the Motor Car-

rier Act, is a question of serious import, which is likely to be constantly recurring. By virtue of the here relevant section of the Motor Carrier Act (49 U. S. C., § 304 (a)) the Interstate Commerce Commission has power to issue reasonable regulations concerning not only maximum hours of service, but also safety of operation and equipment, continuous and adequate service, and uniform systems of accounts, records and reports. Until the Interstate Commerce Commission issues its regulations under this section of the Motor Carrier Act, all carriers by motor vehicle in interstate commerce and all State regulatory authorities will be in doubt whether State regulations of the same subject-matter are still in effect. A decision by the Supreme Court of the United States in this cause will remove this grave uncertainty by deciding to what extent the enactment of the here relevant section of the Motor Carrier Act (49 U. S. C., § 304 (a)) has rendered inoperative State regulations of the same subject-matter.

F.

Cases Sustaining the Jurisdiction.

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Timeliness of appeal. *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31.

2. Jurisdiction to entertain an appeal from the decision of a State court sitting in review of a State public utilities commission. *Grafton County Electric Light Co. v. State*, 77 N. H. 490, 508; *Federal Radio Commission v. Nelson*, 289 U. S. 266; *Public Service Commission of Porto Rico v. Havemeyer*, 296 U. S. 506; *Bradley v. Public Utilities Commission of Ohio*, 289 U. S. 92; *Northwestern Bell Telephone v. Nebraska Railway Commission*, 297 U. S. 471.

3. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute violates the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States. *Smith* v. *Cahoon*, 283 U. S. 553; *Aero Mayflower Tea Co.* v. *Georgia Public Service Commission*, 295 U. S. 285; *Hartford Steam Boiler Co.* v. *Harrison, Insurance Commissioner*, 301 U. S. 459; *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 476.

4. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute is repugnant to a statute of the United States. *Northern Pacific Railway Co.* v. *Washington*, 222 U. S. 370; *Erie Ry. Co.* v. *New York*, 233 U. S. 671; *Pennsylvania Railroad Co.* v. *Public Service Commission*, 250 U. S. 566; *Napier* v. *Atlantic Coast Line Ry. Co.*, 272 U. S. 605; *Oregon and Washington R. R. and N. Co.* v. *Washington*, 270 U. S. 102; *Missouri R. R. Co.* v. *Porter*, 273 U. S. 341.

Therefore the appellant, H. P. Welch Company, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code.

Respectfully submitted,

RICHARD F. UPTON,
LAWRENCE I. DUNCAN,
ROBERT W. UPTON,
Petitioner and Appellant.
Attorneys for H. P. Welch Company,

APPENDIX.

PUBLIC SERVICE COMMISSION.

#2966.

June 7, 1938.

H. P. WELCH COMPANY

v.

STATE.

Appeal, from an order of the Public Service Commission suspending for five specified days "any and all registration certificates issued by this Commission, permitting the H. P. Welch Company to lawfully transport property for hire in motor vehicles between points within this State, either as a common carrier or contract carrier."

The H. P. Welch Company, for convenience hereinafter referred to as the company, is a Massachusetts corporation engaged in the business of transporting property for hire over the public highways of this and other states. In the conduct of its business it owns and operates a fleet of motor trucks, eighteen of which were registered with the Public Service Commission under Laws 1933, *c.* 106, *s. s.* 2, 3, as both common and contract carriers for the year 1936, and twenty of which were so registered for the year 1937. Computed on the basis of tonnage approximately 99% of its business during those years was in interstate commerce and the remaining 1% was in intrastate commerce.

On April 13, 1937, the Public Service Commission ordered the company to "show cause why its common and contract carrier certificates should not be suspended or revoked," and set May 6, 1937, as the date for hearing. This order recited violations by the company of the provisions of Laws 1933, *c.* 106, *s.* 8, "by requiring or permitting a driver to operate after he has been continuously on duty for more than twelve hours." It also recited violations by the company of rule 4N of Circular No. 2 of the commission's administrative rulings "by requiring or permitting a driver

to operate without a record on the vehicle of his hours of service, and by failure to file with the Commission the 'Hours of Service Record' of each driver." At the hearing held pursuant to this order the company appeared by counsel and was given full opportunity to present its evidence and its arguments.

On December 11, 1937, the Public Service Commission filed its report and the order of suspension quoted above. By stipulation the order was suspended pending the outcome of this appeal.

Such further facts as are deemed material are stated in the opinion.

Lawrence I. Duncan and *Robert W. Upton* (*Mr. Duncan* orally), for the plaintiff.

Dudley W. Orr (by brief and orally), for the State.

WOODBURY, *J.*:

The plaintiff does not contend that the legislature in enacting Laws 1933 *c.* 106, as amended by Laws 1933, *c.* 169, intended to impose direct regulations upon interstate commerce as such, nor does it contend that the provisions of these statutes operate either to discriminate against such commerce or to impose an undue or unreasonable burden upon it. *Southern Railway Co.* v. *King*, 217 U. S. 524. Neither does the company challenge the doctrine established in *Hendrick* v. *Maryland*, 235 U. S. 610, 622, and consistently adhered to ever since, (*South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, — U. S. —, and cases cited), to the effect that "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others." As summarized in its brief the plaintiff's appeal is "upon the ground that the statute denies to it the equal protection of the laws guaranteed by the Bill of Rights of the Constitution of New Hampshire and by the 14 Amendment to the Constitution of the United States, upon the ground that the statute and Rule 4N, as applied to interstate commerce, have been superseded by the

'Motor Carrier Act, 1935' upon the ground that Rule 4N and the orders of the Commission relating thereto exceed the powers and authority of the Commission, and upon the further grounds that the evidence does not establish the Company's responsibility for the alleged violations, and that the findings and conclusions of the Commission set forth above are unwarranted by the evidence."

The statute under consideration applies only to those transporting property for hire, either as common or contract carriers as the latter term is defined in the act, and it applies to them only in so far as they operate motor vehicles over the public highways between points within this state. It does not apply to "those transporting products of their own manufacture or labor," and, in addition, section 4 of the act specifically exempts from its provisions "motor vehicles not principally engaged in the transportation of property for hire," and "motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten mile limit on occasional trips, not exceeding two trips in any thirty-day period."

The company contends "that these exceptions and exemptions are discriminatory, and deny to it the equal protection of the laws guaranteed by the Constitution of New Hampshire and the Fourteenth Amendment to the Constitution of the United States."

Under Part I of the constitution of this state and under the fourteenth amendment to the constitution of the United States persons similarly situated are guaranteed similarity of treatment. In this respect the fourteenth amendment "adds nothing to the rights and liberties of the citizens of this state," (*State* v. *Pennoyer*, 65 N. H. 113, 115), "for our constitution secures to every person within its jurisdiction all the rights guaranteed to citizens of the United States by that amendment." *State* v. *Aldrich*, 70 N. H. 391. Not every legislative classification is within the ban of these constitutional limitations however. "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is

limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier* v. *Connolly*, 113 U. S. 27, 32; Or, as stated in *Opinion* of the Justices, 85 N. H. 562, 564, "Classification to be valid must reasonably promote some proper object of public welfare or interest and may not be sustained when the selection and grouping is so arbitrary as to serve no useful purpose of a public nature." Legislative classification to be constitutional must be based upon some substantial foundation, it may not be arbitrary, it must be germane to the purpose of the law. *Woolf* v. *Fuller*, 87 N. H. 64, 72, 73.

Recent decisions of the Supreme Court of the United States sustain the validity under the fourteenth amendment of classifications substantially similar to those made in the statute under consideration. Under these decisions a state, in the interest of highway safety, may not only single out carriers for hire by motor vehicle from such carriers in general and apply to the former regulations from which the latter are exempt, but it may also create classifications among carriers for hire based upon the nature and extent of their use of the highways. *Packard* v. *Banton*, 264 U. S. 140; *Bekins Van Lines, Inc.* v. *Riley*, 280 U. S. 80; *Alward* v. *Johnson*, 282 U. S. 509; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Sproles* v. *Binford*, 286 U. S. 374; *Hicklin* v. *Coney*, 290 U. S. 169.

In the *Continental Baking Company* case the court said, page 373, "The legislature in making its classification was entitled to consider frequency and character of use and to adapt its regulations to the class of operations, which by reason of their habitual and constant use of the highways, brought about the conditions making regulation imperative." And, in *Sproles* v. *Binford, supra*, the court said: "There is no constitutional requirement that regulation must reach every class to which it might be applied,—that the legislature must regulate all or none. The State is not bound to cover the whole field of possible abuses. The question is whether the classification adopted lacks a rational basis."

These decisions establish that classifications of the sort here under consideration do not lack a "rational basis",

and they are conclusive upon us on the question of the validity of Laws 1933, *c.* 106, under the fourteenth amendment to the federal constitution. In addition these decisions "are authority to be weighed" on the question of the validity of that statute under the constitution of this state. *State* v. *Pennoyer*, 65 N. H. 113, 115.

One of the expressed and evident purposes of the statute before us is to protect the users of the highways of this state from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from the effects of fatigue. Undoubtedly this is a legitimate exercise of the state's police power, and, while it is true that a fatigued truck-driver transporting goods manufactured by him or his employer is as great a menace upon the highway as such a driver transporting property for hire, it does not follow that in the interest of highway safety no distinction may be drawn between them on the basis of the industry in which they are engaged. The legislature may well have been in the possession of facts indicating a practice on the part of carriers for hire to employ their drivers for long hours, while it may also have had before it evidence that such was not the practice among the owners of trucks used for other purposes. We may take judicial notice of the fact that trucks not used by common or contract carriers create a substantial amount of traffic over the highways but we cannot take judicial notice of the conditions of employment in those industries. In other words, instances of the employment of truck-drivers for excessive hours may occur only sporadically and then under circumstances of emergency in industries of this latter sort, while excessive hours of service may be a regular practice in the business of transporting goods for hire. At least, upon the basis of facts judicially known, we cannot say that the existence of such a situation could not have been found by the legislature, and under these circumstances its classification must be allowed to stand. *South Carolina State Highway Dept.* v. *Barnwell Bros., Inc.*, — U. S. —.

Similar considerations support the exemption from the provisions of the act of "motor vehicles not principally engaged in the transportation of property for hire." Exces-

sive hours of employment on vehicles so used may either be of such infrequent occurrence that regulation of them is unnecessary, or else it may have been the legislative judgment that regulations adequate to control persons regularly engaged in the business of common and contract carriers for hire by motor truck would bear upon persons not regularly so engaged with a weight disproportionate to any possible benefit which might thereby accrue to the public. Whether, under our constitution, frequency and extent of operation may alone provide a sufficient basis for classification we do not undertake to say, but they may properly be supporting reasons therefor when, as here, some other reason appears in conjunction with them.

In the case of local operations, in which from necessity the periods of driving must be frequently interrupted, it may well be that fatigue does not develop as rapidly or become as great as it does in a driver subjected to the monotony incident to long and uninterrupted trips. For this reason the legislature may reasonably have decided that local operations did not require any regulation at all while regulation was imperative as to operations covering greater distances.

We are therefore unable to say that the classifications contained in the act are not germane to its purpose, that they lack a "rational basis," or that all persons in the same class are not accorded similar treatment. It follows that the act is not unconstitutional.

The case principally relied upon by the company, (*Smith* v. *Cahoon*, 283 U. S. 553), is not in point. In that case the court was called upon to consider a state statute purporting to regulate carriers of property for hire by motor trucks in the interest of highway safety which excluded from its operation motor vehicles used to transport agricultural and dairy products and fish and oysters. In holding this classification arbitrary, without relation to the purpose of the act and hence unconstitutional, the court said: "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters and those who carry for

hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities."

The distinction between the case cited and the one at bar is obvious. In the former, classification is based upon the kind of goods carried, and that without relation to the nature of those goods as inflammable, explosive, bulky or otherwise likely to create a hazard when in transit over the highway. In the case before us, on the other hand, the classification is upon the basis of the nature of the business of the owner of the vehicle and, as appears above, a classification upon this basis is not necessarily an arbitrary or unreasonable one. The above distinction between the *Smith* case and cases similar to the one before us was fully elaborated in *Aero Mayflower Tea Co.* v. *Georgia Public Service Commission,* 295 U. S. 285.

The company's next contention is to the effect that the state statute has been superseded by the federal Motor Carrier Act, 1935, 49 Stat. 543.

Briefly stated the record of events is as follows: The state statute under consideration became law on May 6, 1933. The administrative rulings, Circular No. 2, referred to above became effective on August 1, 1936. The violations thereof and of the statute for which the company's registration certificates were suspended occurred during the latter part of 1936 and the first three months of 1937.

The federal Motor Carrier Act, 1935, became law in August 1935, and in that act, *s.* 204 (a) (2), it is provided that the Interstate Commerce Commission "may establish reasonable requirements with respect to * * * maximum hours of service of employees." Pursuant to this permissive power that commission held hearings at various places during the year 1937, and on December 29 of that year rendered its decision. In this decision it established maximum hours of service for employees of both common and contract carriers for hire by motor vehicle which are substantially similar to those established in Laws 1933 *c.* 106, *s.* 8, and in addition it provided for the keeping and filing of records of service by such employees which are also substantially similar to the provisions of rule 4N mentioned above. By order of the Interstate Commerce Com-

mission its requirements in the above respects were not to become effective until July 1, 1938.

The violations of the state act for which the company was put upon trial occurred, therefore, during the interval between the passage of the federal act and action thereunder by the Interstate Commerce Commission. The question presented is whether or not, during that time, the operation of the state statute, as it affected interstate commerce, was suspended by the federal act.

Generally stated the rule is that reasonable nondiscriminatory state action under the police power may indirectly affect interstate commerce, but it may affect such commerce only until Congress in the exercise of its plenary power takes action which covers the field. *Oregon etc. Co.* v. *Washington,* 270 U. S. 87. Both the state and the federal government cannot occupy the same field at the same time, (*University Overland Express Co.* v. *Griffin, ante,* and cases cited), and the time when Congress preempts the field depends upon its intention.

Applying this rule of Congressional intention the Supreme Court of the United States in *Northern Pacific Railway* v. *Washington,* 222 U. S. 370, and *Erie Railroad Co.* v. *New York,* 233 U. S. 671, held that state regulations of the hours of service of train crews, in so far as they applied to employees upon trains moving in interstate commerce, were suspended upon the date of passage of a federal statute upon the subject. This federal statute was passed on March 4, 1907, but by its terms it was not to take effect until one year later. In holding that the state statutes were ineffective as to interstate commerce during that year the court said that Congress had manifested its intention to enter the field when it enacted the statute and that by postponing its effective date for a year it manifested an intention that the field should remain without regulation during that time.

The above cases are strongly relied upon by the company but we do not consider them to be in point. The reason for this is that the Hours of Service Act, (34 Stat. 1415), differs radically from the Motor Carrier Act, 1935. In the former Congress established the maximum hours of serv-

ice permitted and provided that the act should become operative one year from the date of its passage. In the latter Congress gave the Interstate Commerce Commission permission to fix the maximum hours of service and provided no date upon which the commission was required to put its rulings into effect. The cases establish that this difference is a material one.

In *Missouri Pacific Railway Co.* v. *Larabee Mills Co.*, 211 U. S. 612, 623, it is said that "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens." In *Northwestern Bell Tel. Co.* v. *Nebraska State Railway Commission*, 297 U. S. 471, it was held that state regulations in respect to depreciation rates for property used by a telephone company in interstate commerce were not suspended by a federal statute giving the Interstate Commerce Commission authority to prescribe such rates "as soon as practicable." The court said, page 478, "The statute did not envisage an immediate adoption of depreciation rates by the Interstate Commerce Commission. A long period might elapse, as the event has shown, before the Commission would be prepared to act. It cannot be supposed that Congress intended by the amendment to preclude all regulation, state and national, of depreciation rates for telephone companies, for an indefinite time, until the Interstate Commerce Commission could act administratively to prescribe rates." See also *Smith* v. *Ill. Bell Tel. Co.*, 282 U. S. 133.

Upon the authority of the cases last cited we hold that t was not the intention of Congress to enter the field of regulation of hours of service of truck-drivers engaged in nterstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject. Whether that date was December 29, 1937, when those rulings were made, or whether it will not be until July 1, 1938, when they will go into effect, is a question not presented n the case at bar and one upon which we express no opinion. The violations of the state act charged against the

company occurred before either of those dates and so at a time when the state act was in full force and effect. This same result has been reached as to other similar regulatory features of the Motor Carrier Act, 1935. *L. & L. Freight Lines, Inc.*, v. *Railroad Commission of Florida*, 17 F. Supp. 13; *Werner Transportation Co.* v *Hughes*, 19 F. Supp. 425.

The company further contends that the commission is without statutory authority to promulgate rules and regulations for the enforcement of the act and that in consequence it cannot be punished for failure to conform to the provisions of rule 4N of Circular No. 2 of the Administrative Rulings referred to above.

The act does not in terms give the Public Service Commission authority to prescribe rules and regulations for the carriers to which it applies. A study of the act as a whole, however, makes it abundantly clear that the legislature intended to commit the enforcement of its provisions to the commission. In addition, the section of the act which limits hours of service, (s. 8), specifically provides that "The commission shall have authority to enforce the provisions of this section," and section 12 provides a punishment by fine for "violating the orders of the commission issued under the provisions of this act." These provisions taken together and considered in the light of the general scheme of the statute and the rule making power given to the commission in other phases of its activities, lead to the conclusion that although the commission is "an agency of limited powers and authority," (*Petition of Boston & Maine Railroad*, 82 N. H. 116) it was the legislative intention that the commission should enforce the provisions of this statute in the same way that it enforced its supervisory authority in other respects, *i. e.* by the promulgation of appropriate rules and regulations.

To construe the sentence quoted from section 8 otherwise than as above would be to hold that it gives to the commission only such powers of enforcement as are given by the general law to police officers. To say the least it seems unlikely that such was the intention of the legislature.

Rule 4N, after paraphrasing the provisions of section 8 of the statute, requires that each driver shall keep with

him while on duty a record of his hours of service on forms prescribed by the commission, and that copies of such records shall be kept by his employer. It also provides that these records shall be filed with the commission at the end of each month. These rules do not attempt to establish any broad "policy and standard for action," (*Ferretti* v. *Jackson*, 88 N. H. 296, 304; *Opinion of the Justices*, 88 N. H. 497), and so do not amount to an unconstitutional usurpation of legislative power by the commission. The rules are well calculated to aid the commission in the enforcement of the act and are a valid exercise by the commission of the powers given to it by the statute.

The company's next contention is that the Public Service Commission exceeded its statutory authority in suspending the company's registration certificates for violation of the commission's administrative rules. A sufficient answer to this contention is that it does not appear that the commission's order of suspension was based upon such violations rather than upon a violation of the statute itself.

The statute, (*s.* 11), gives the commission authority to suspend certificates of registration for violations of the provisions of the act. Section 12 as amended by Laws 1933, *c.* 169, *s.* 2, imposes a fine of not more than one hundred dollars for violation of "the provisions of this act or the orders of the commission issued under the provisions of this act." We need not consider the question of the power of the commission to punish under this latter section because it has imposed no fine. Instead it has suspended the company's certificates of registration. This is one of the punishments prescribed by the act for its violation and authority to suspend was clearly granted to the commission. Suspension of registration certificates is not a punishment provided for violation of the rules of the commission, and while there is evidence that the plaintiff had violated both the act and the administrative orders, there is nothing to show that the commission based its order of suspension upon a violation of the latter rather than upon a violation of the former. To assume without evidence that it had disobeyed the statute by imposing the suspension for a violation of its orders rather than for a violation of

the act would be to assume that the commission had disregarded the clear wording of the statute. This is an assumption we are not compelled to make.

It is established law in this jurisdiction that, in the absence of indications to the contrary, a general finding includes a finding of all the special facts necessary to sustain it. *Spaulding* v. *Mayo*, 81 N. H. 85; *Bean* v. *Quirin*, 87 N. H. 343, 350, and cases cited. We see no reason why this principle applicable to the findings of inferior courts is not also applicable to the Public Service Commission when acting judicially, and, applying it to the order of the commission before us, we conclude that the suspension of registration which the commission imposed upon the company was for the violation by it of the provisions of the statute and that its violations of the administrative orders were either not found or were permitted to pass without punishment.

The evidence before the commission of the company's violation of the statute by requiring or permitting its drivers to operate its trucks for illegally excessive hours was in the form of reports filed under the provisions of rule 4N by a few of the drivers. The company does not, nor may it, complain of the informality with which this evidence was presented. P. L. *c.* 238, *s.* 10; *State* v. *New Hampshire Gas & Electric Co.*, 86 N. H. 16, 31. Its complaint is that this evidence provides an insufficient basis for the order of suspension for the reason that it does not show that the company "required or permitted" its drivers to operate for excessive hours; that it does not show that driving in excess of the statutory limits occurred in New Hampshire rather than in other states in which the drivers served; and that it fails to reveal that such excess hours of operation did not occur under circumstances of emergency or upon a truck under the control of two licensed operators.

The evidence contained in the reports on file with the commission show not only periods of employment for longer hours than the statute permits, but they also show repeated instances of such excessive hours and the oral testimony given before the commission by the company's local manager showed that the drivers were paid on an hourly basis.

Under these circumstances it would be little short of preposterous to say that the company had no knowledge of the hours of its drivers' employment. It would be equally preposterous to find that the drivers when operating over the statutory limits were acting outside the scope of their employment; that they were engaged upon a frolic of their own. The obvious inference from the testimony is that the company not only permitted but also even arranged its trips so as to require that its drivers serve beyond the statutory limit of hours of service.

Proof that some of the company's drivers operated for hours in excess of statutory limit in this state is contained in the inferences which may be drawn from their reports. These reports indicate that some of the drivers lived in Manchester and that their tours of duty after excessive hours of operation ended there. Obviously to have completed such a period of service within this state they must of necessity have operated illegally within its borders. The fact that some of the hours of service which went to make up the statutory limit occurred outside the state is not material. There is no violation of the statute until an operator has reached the limit of hours of operation allowed. The offense consists in operating thereafter, and such violation could findably have occurred within the state.

The other respects noted above in which it is claimed that the evidence is deficient relate to matters peculiarly within the company's knowledge. If such facts existed it was the province of the company to offer evidence of their existence, (*State* v. *Foster*, 23 N. H. 348; *State* v. *Lapointe*, 81 N. H. 227; *State* v. *Bozek*, 81 N. H. 277), and full opportunity was given to it to do so.

Since the days specified for the suspension of the company's certificates have passed, the commission may amend its order by specifying other days upon which its order of suspension shall be operative.

Appeal dismissed.

All concurred.